Kyalo v Kandia Fresh Produce Limited (Civil Case E248 of 2023)
[2024] KEMC 19 (KLR) (12 August 2024) (Ruling)

Neutral citation: [2024] KEMC 19 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL CASE E248 OF 2023

CN ONDIEKI, PM

AUGUST 12, 2024

BETWEEN

DAVID MUTUNGA KYALO ..... PLAINTIFF

AND

KANDIA FRESH PRODUCE LIMITED ..... RESPONDENT

RULING

Part I: The Defendant/Applicant's Case

1. On 31st July 2023, the plaintiff/Respondent (hereinafter "the Respondent") filed a suit against the defendant/Applicant (hereinafter "the Applicant") vide a Plaint dated 27th July 2023, seeking general damages for injuries he sustained from a road traffic accident involving motor vehicle registration number KAS 532V, special damages, costs of the suit and interest on the forgoing heads.

2. On 23rd August 2023, the Applicant entered appearance and filed a Statement of Defence dated 21st August 2023.

3. On 14th May 2024, the Applicant approached this Court vide a Notice of Motion dated 13th May 2024, predicated on the sole ground that the Respondent was an employee of the Applicant at time of the accident, in the course of his employment as a conductor, in the subject motor vehicle.

4. On basis of the foregoing, the Applicant advances that the claim is in the nature of work injury claim, within the meaning of the *Work Injury Benefits Act*, 2007, as opposed to an ordinary road traffic accident and as a consequence, this Court lacks jurisdiction to determine the claim.

5. These facts are deposed in the Affidavit of the one Dickson Mulwa, who describes himself as a Human Resource Manager of the Applicant. Attached to the Supporting Affidavit is a document marked DM1, constituting a letter apparently addressed by the Applicant to Old Mutual Insurance

Kenya Limited advising that the Respondent was its employee at the time of the accident, attaching a contribution tabulation for NHIF and NSSF.

6. In his written submissions dated 16th May 2024 and filed on 18th May 2024, learned counsel Ms. Ochieng instructed by the firm of Messieurs AKO Advocates LLP representing the Applicant, has submitted principally on the import of jurisdiction of the Court; the jurisdiction to determine WIBA matters and the legal effect of lack thereof. Reliance is placed upon Benson Makori Makworo v Nairobi Metropolitan Servioces & 2 others [2022] eKLR; Owners of the Motor Vessel Lillian 'S' v Caltex Oil (Kenya) Limited [1989] KLR 1; Law Society of Kenya v Attorney General & another [2019] eKLR; and the Practice Directions dated 28th April 2023.

7. It is urged that the jurisdiction to determine this claim lies with the Director of Occupational Safety and Health Services.

Part II: The Plaintiff/respondent's Case

8. This Application is opposed. In his Replying dated 11th June 2024 and filed on 12th June 2024, the Respondent has denied all material facts. Particularly, the Respondent states that at the time of the accident, he was a passenger and not an employee of the Applicant. The Respondent has denied the assertion that he was an employee of the Applicant.

9. In his written submissions dated 11th June 2024 and filed on 12th June 2024, learned counsel Mr. Langalanga instructed by the firm of Messieurs Langalanga & Company Advocates representing the Respondent, has rehashed the substance of the Replying Affidavit.

10. It is urged that the Applicant has failed to discharge its burden and standard of proof that the Respondent was an employee at the time of the accident, citing sections 107 and 108 of the *Evidence Act* as construed in Muriungi Kanoru Jeremiah v Stephen Ungu M'Mwarabua [2015] eKLR.

11. It is submitted that the Applicant failed to produce any document to prove the employment relationship, placing reliance upon Kenya Union of Commercial Food and Allied Workers vs. Mwana Black Smith Limited [2013] eKLR; and Mary Mmbone Mbayi vs. Chandubhai Patel 7 another, Cause Number 761 of 2011.

Part III: Questions For Determination

12. Commending themselves for determination – gleaning from the Notice of Motion, Replying Affidavit and the rival written submissions - are two questions as follows:

    i. Whether the Applicant has proved - on a balance of probabilities - that at the time of the accident, the Respondent was its employee.

    ii. Whether the claim falls within the jurisdiction of the Director of Occupational Safety and Health Services.

Part IV: Analysis of The Law; Examination of Facts; Evaluation of Evidence and Determination

13. This Court now embarks on analysis and determination of the two questions in turn.

(i) Whether the Applicant has proved - on a balance of probabilities - that at the time of the accident, the Respondent was its employee

14. Whenever an employer asserts that the other was its employee, then the onus of proof lies with the employer to prove that an employment relationship existed, Courtesy of the obligation reposed on

the employer under section 74 of the *Employment Act*, 2007, to keep records. In Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR, the Court expressed a judicial view which I concur with that "11. ... it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice."

15. In its determination to prove that the Respondent was its employee at the time of the accident, the Applicant attached to the Supporting Affidavit – without incorporating it into the Affidavit - a document marked DM1, constituting a letter apparently addressed by the Applicant to Old Mutual Insurance Kenya Limited advising that the Respondent was its employee at the time of the accident, attaching a contribution tabulation for NHIF and NSSF.

16. Rule 9 of the Oaths and Statutory Declaration rules provides that "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification." Rule 10 thereof provides that "The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule." And the Third Schedule reads: "This is the exhibit marked "... " referred to in the annexed affidavit of..."

17. Contrary to the contemplation of Rules 9 and 10 read with the Third Schedule that the exhibits should be referenced in the body of the Affidavit, the document marked DM1 was merely attached to the said Affidavit without formally incorporating it into the body of the Affidavit. This Court would have wished to expunge but for the saving grace housed in Order 19 rule 7 which provides that "The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality." This is a discretionary power and pf course, discretionary power is ordinarily deployed to advance the course of justice.

18. In exercise of this discretionary power, this Court invokes Order 19 rule 7 and saves the said irregular annexture as if it wad properly filed.

19. Having considered the said document marked DM1 - in the context of the obligation of the Applicant of keeping records housed in section 74 of the *Employment Act* – the material has generated persuasion in the mind of this Court that on a balance of probabilities, that it's more probable than not, that the Respondent was an employee of the Applicant at the time of the accident.

(ii) Whether the claim falls within the jurisdiction of the Director of Occupational Safety and Health Services

20. It's now an entrenched edict, well-settled I must add, that first, jurisdiction is everything and second, a Court of law can only hear and determine that which is within its domain, as circumscribed by *the Constitution* or Statute or both. The designers of this edict were justified by well-founded fears, chief among them being that authority -except when circumscribed- is inherently corruptive and a Court may fall into the temptation of becoming what Lord Mersey once described in his riveting analogy as "an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be." See G & C Kreglinger v New Patagonia Meat & Cold Storage Co. Ltd [1913].

21. Since jurisdiction is everything and bears a preliminary determinative effect on both this Application and the main suit, it follows that a Court of law must inquire into its jurisdiction before a decision

is rendered on merit. Without it, a Court has no power to make one more step and should instead down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. See the cause celebre and now locus classicus case in jurisdiction disputes Court of Appeal decision in Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd [1989] KLR 1, where Nyarangi, JA pronounced himself as follows: "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a Court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given."

22. There is no universally accepted definition of jurisdiction. Broadly speaking, jurisdiction is the authority or power granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. In the context of Kenya, jurisdiction of a Court is the authority or power granted to a Court to admit, consider and determine a legal matter on an area of responsibility defined by *the Constitution* and/or Act of Parliament and more particularly, the power reposed in a Court to interpret and apply the laws contemplated by Article 2 of *the Constitution* of Kenya and those set out under section 3 of the *Judicature Act*. See the locus classicus on this subject namely the Court of Appeal decision in Owners of Motor Vessel "Lillian S" vs. Caltex Oil (K) Ltd [1989] KLR 1, per Nyarangi, JA. Article 2(2) of *the Constitution* provides that no person may claim or exercise State authority except as authorized under *the Constitution*.

23. Jurisdiction of a Court of law ought to flow either from *the Constitution* or legislation or both. In the case of Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, the Supreme Court of Kenya held that "[68] A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred (to it) by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. We agree with Counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, "In the Matter of Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction

upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal the legislature would be within its authority to prescribe the jurisdiction of such Court or tribunal by statute law." See also the Supreme Court of Kenya decision In the Matter of Interim Independent Electoral Commission [2011] eKLR. In the foregoing context, Courts and other public bodies should work within the powers expressly conferred either by statute or legislation of both, but not by implication. Power should not be expanded through judicial craft. See Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR, per Odunga, J.; Chogley v The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Warburton v Loveland [1831] 2 DOW & CL. (HL) at 489; Lall v Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General v Prince Augustus of Hanover [1957] AC 436 AT 461; Republic v Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

24. Article 2(2) of *the Constitution* provides that "No person may claim or exercise State authority except as authorised under this Constitution." Article 162 of *the Constitution* enshrines the system of Courts in Kenya. Article 162(4) of *the Constitution* provides that subordinate Courts are the Courts established under article 169 of *the Constitution* or alternatively, those Courts established by Parliament in accordance with Article 169. The text of Article 162 aforesaid reads thus: "162. (1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2). (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to— (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2). (4) The subordinate Courts are the Courts established under Article 169, or by Parliament in accordance with that Article."

25. Article 169 sets out the subordinate Courts referred to in Article 162(4) thereof. In particular, Article 169(1) (a) establishes Magistrates Courts. Unlike superior Courts whose jurisdiction is primarily set out in *the Constitution* and other ancillary jurisdiction found in legislation like the *Judicature Act*, in the case of Magistrates' Courts, *the Constitution* has donated the power to define the jurisdiction thereof to Parliament Courtesy of Article 169(2) thereof. The text of Article 169 reads as follows: "169. (1) The subordinate Courts are— (a) the Magistrates Courts; (b) the Kadhis' Courts; (c) the Courts Martial; and (d) any other Court or local tribunal as may be established by an Act of Parliament, other than the Courts established as required by Article 162 (2). (2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the Courts established under clause (1)."

26. In line with the command of Article 169(2) of *the Constitution*, Parliament repealed the *Magistrates' Courts Act*, Cap 10 of the Laws of Kenya in 2015 and re-enacted it as the *Magistrates' Courts Act*, 2015. In the said re-enacted Act, the Preamble reads thus "AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of *the Constitution*; to confer jurisdiction, functions and powers on the Magistrates' Courts; to provide for the procedure of the Magistrates' Courts, and for connected purposes". The pre-amble clearly indicates that the enactment is to actualize among other intentions, the command of *the Constitution* contained in Article 169 (2) of *the Constitution*. It is in line with that command that Parliament housed the jurisdiction of Magistrates' Courts. Categorically, sections 6, 7, 8, 9 and 10 of the *Magistrates' Courts Act*, 2015 is dedicated to the jurisdiction of Magistrates. Section 6 provides for the criminal jurisdiction of Magistrates' Courts; section 7 provides for civil jurisdiction of the said Courts; section 8 provides for claims relating to violation of human rights jurisdiction of the said Courts; section 9 provides jurisdiction on labour, employment, environment and land; and finally, section 10 provides for jurisdiction to punish for contempt of Court.

27. In particular, section 10(5) of the *Work Injury Benefits Act*, 2007 (WIBA) read with the stated rule 2(c) of the Workmen's Compensation (Compulsory Insurance) Order, issued under the said Act, are germane to this question.

28. In order to put this issue in perspective, it is imperative that this Court reproduces section 10 of the WIBA which provides as follows: "(1) An employee who is involved in an accident resulting in the employee's disablement or death is subject to the provisions of this Act, and entitled to the benefits provided for under this Act. (2) An employer is liable to pay compensation in accordance with the provisions of this Act to an employee injured while at work. (3) An employee is not entitled to compensation if an accident, not resulting in serious disablement or death, is caused by the deliberate and wilful misconduct of the employee. (4) For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting— (a) in contravention of any law or any instructions by or on behalf of his employer; or (b) without any instructions from his employer. (5) For the purposes of this Act, the conveyance of an employee to or from the employee's place of employment for the purpose of the employee's employment by means of a vehicle provided by the employer for the purpose of conveying employees is deemed to be in the course of the employee's employment. (6) For the purposes of this section, an injury shall only be deemed to result in serious disablement if the employee suffers a degree of permanent disablement of forty percent or more." {Personal emphasis}

29. Rule 2 of the Workmen's Compensation (Compulsory Insurance) Order, enshrines an obligation of the employer to take out an insurance cover in inter alia, circumstances where the "...employer in any undertaking or part of any undertaking which consists in the carrying on, for gain or reward, of one or more of the following activities, that is to say— (c) the carriage of passengers and goods, or either of them, by any motor vehicle whether or not required to be licensed as a public service vehicle under the *Traffic Act* (Cap. 403) or a road service licence, or public carriers licence or a limited carriers licence, under the Transport Licensing Act (Cap. 404): Provided that this Order shall not apply to— (i) the Government of Kenya; (ii) any employer who provides and maintains in force a security consisting of an undertaking by a surety, approved by the Minister, to make good, subject to any conditions specified in such undertaking and up to an amount approved by the Minister, any failure by the employer to discharge any liability which he may incur under the Act to any workmen employed by him."

30. And so, whenever an employee is being conveyed to or from work aboard the employer's motor vehicle and unfortunately the motor vehicle is involved in a traffic road accident, by operation of law namely WIBA, the employee is deemed to have picked the injuries in the course of the employee's employment and in this regard, the employer is obligated to take out an insurance cover.

31. In common law, it was possible for an employee to maintain an action against the employer for the negligent acts of the fellow employee. In this regard, a conductor would properly so maintain an action against the employer for the negligent acts of the driver even where the driver and conductor served as employees of the employer in the same motor vehicle. See the very interesting House of Lords Decision in Lister v Romford Ice and Cold Storage Co Ltd [1956] UKL 6, where a father Martin Lister was a conductor of a waste disposal lorry which was being driven by his son, Martin Lister Junior, both of whom were employees of the Respondent therein. While in the course of duty, Martin Lister Junior ran over his father Martin Lister and occasioned injuries. The father successfully maintained a road traffic accident negligence claim against the employer, Romford Ice and Cold Storage Co Ltd, under the doctrine of vicarious liability. Since the employer had taken out an insurance cover, the insurer settled the claim. However, the case took an interesting turn when the insurer successfully maintained

a claim against Martin Lister Junior, of course in the name of the employer, under the doctrine of subrogation (which led to this decision of the House of Lords in Lister v Romford Ice and Cold Storage Co Ltd [1956] UKL 6).

32. This common law position was adopted in section 25 of the Workman's Compensation Act, Cap 236 - which was repealed by the WIBA – which was permissive to a dual forum system which permitted election of one or both for a for such claims, complete with a provision that in case the injured party is compensated under the Workman's Compensation Act and later, in litigation, a Court assesses a higher amount of damages, the amount which was awarded earlier by the Director shall be deducted therefrom. It is imperative to reproduce section 25 of the repealed Act, which was permissive to the dual forum system as follows: "Proceedings Independently of This Act. 25. (1) Where the injury was caused by the personal negligence or wilful act of the employer or of some other person for whose act or default the employer is responsible, nothing in this Act shall prevent proceedings to recover damages being instituted against the employer in a civil Court independently of this Act: Provided that - i. if damages are awarded after compensation has been paid, the amount of damages awarded in such proceedings shall take into account the compensation paid in respect of the same injury under this Act; ii. a judgment against the employer in such proceedings shall be a bar to proceedings under this Act in respect of the same injury at the suit of any person by whom or on whose behalf the proceedings against the employer were taken. (2) If, in proceedings independently of this Act or on appeal, it is determined that the employer is not liable under such proceedings, the Court in which such proceedings are taken or the appellate tribunal may proceed to determine whether compensation under this Act is liable to be paid to the plaintiff, and may assess the amount of compensation so payable, but may deduct from such compensation any extra costs which in the opinion of the Court or appellate tribunal have been incurred by the employer by reason of the proceedings having been taken independently of this Act." For instance, see Kenya Power & Lighting Company Ltd vs. Ann Wambui (Suing as the administratrix in the estate of Thomas Wahome Wambui) & another [2016] eKLR, where the two trajectories were invoked and the amount of damages which had been awarded by the director was duly deducted from the damages which had been awarded by the Court.

33. However, the common law position suffered a revolutionary blow in the hands of the unyielding section 16 of the WIBA which shut down the litigation option and left open only one forum, namely the Director of Occupational Safety and Health Services. Section 16 of the Act provides that "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

34. In Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others [2014] eKLR, the Supreme Court of Kenya (SCORK) defined ouster clauses, considered their purpose and identified their clusters as follows: "[115] The foregoing provisions lie at the centre of the ouster-clause controversy. Ouster clauses are provisions in *the Constitution* or a statute that take away, or purport to take away the jurisdiction of a competent Court of law. They deny the litigant any judicial assistance in the relevant matter, and at the same time deny the Courts the scope for making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtail the jurisdiction of the Court, as the relevant matter is rendered non-justiciable before the Courts. The English case, Pyx Granite Co. Ltd v. Minster of Housing [1966] AC 260 indicates that an ouster clause connotes exclusion of the jurisdiction of the Courts, and nothing less. [116] Ouster clauses have been adopted for certain practical and procedural reasons: protecting the integrity of the relevant body, by separating it from the formal legal process; and ensuring finality, preventing unnecessary litigation, or interventionist judicial proceedings. The relevant tribunals, boards or other bodies are perceived

as agents of justice in their special modes, and it is deemed unnecessary to review their decisions. By this arrangement, these bodies or organs are seen to protect the integrity of the relevant system. [117] Ouster clauses can be categorized as constitutional or statutory. Where they are statutory ouster clauses, the statute may confer exclusive jurisdiction on the relevant body to determine the relevant matter. In such a case, the relevant body must act under the statute, and not outside it."

35. Section 16 is a statutory ouster clause. An absolutist, for that matter. In totalitarian terms - with no ifs or buts - it ousts the jurisdiction of the Court in confined circumstances which bring the claim within WIBA.

36. Since such an ouster clause embodies a radical effect on the right of an aggrieved party to have his dispute determined by a Court of law, which directly impacts on the right to access to justice enshrined in Article 48 of *the Constitution*, a rebuttable presumption operations in favour of the Court that Parliament did not intend to exclude the Court's jurisdiction, unless the statutory language introducing the clause is decidedly clear, firm and unequivocal. Otherwise, it will not be upheld. See the test in R. v Medical Appeal Tribunal, ex p. Gilmore [1957] 1 QB 574 and Anisminic v Foreign Compensation Commission [1969] 2 A.C. 147, which was adopted by SCORK in Judges & Magistrates Vetting Board & 2 others vs. Centre for Human Rights & Democracy & 11 others [2014] eKLR, where at paragraph 162, the SCORK laid down the following guidelines in considering the validity of an ouster clause: "Issues pertaining to constitutional governance, and to judicial practices and methods have certain universal dimensions: hence the value of the comparative experience to shed light on Kenyans complex jurisprudential matters. Our consideration of the judicial experience in other countries shows that the ouster clause in Constitutions and in statute law is by no means a novelty. It is apparent, in the case of all the jurisdictions we have considered, that the Courts have perceived such clauses as no more than a professional juristic challenge, each to be resolved in the context of its special facts and circumstances. However, the Courts have in general been guided by certain inclinations, especially the following: (i) the legislative bodies have a popular mandate to make law as they find appropriate, in the public interest; (ii) but their law-making function falls within a constitutional order in which the Judiciary is the regular custodian of the rule of law, and of the rights and freedoms of the individual; (iii) it is presumed by the Courts that the legislature perceives them as a critical player in the scheme of the process of justice, and so does not intend to deprive them of jurisdiction, in those cases in which special tribunals or agencies are established to perform particular tasks; (iv) the Courts have a conventional inclination to interpret statutes in a manner that precludes a ceding of jurisdiction to other agencies; (v) subject to these principles, the Courts have recognized that, indeed, there will be proper instances of jurisdiction being conferred upon other agencies by the legislature; (vi) but when the legislature does so, it has an obligation to express itself in clear, firm and unequivocal language – otherwise judicial interpretation is apt to take the stand that jurisdiction lies with the Courts; (vii) legislative provision for commensurate remedies at the hands of a non-judicial agency, is a relevant factor in determining whether or not the Courts jurisdiction has been ousted; (viii) it is also a relevant factor whether the ouster clause is likely to be a conduit for excess of power, such as would distort the principle of separation of powers, and the principle of balanced exercise of public powers."

37. See also Legal Advice Centre t/a Kituo Cha Sheria & another v Attorney General & 7 others; Law Society of Kenya & another (Interested Parties); Kenya Legal and Ethical Issues Network on HIV & Aids (KELIN) & another (Amicus Curiae) (Constitutional Petition *007 of 2022*) [2024] KEELC 1521 (KLR) (20 March 2024) (Ruling), which invoked the guidelines which were set by the SCORK in Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others [2014] eKLR, and held that: "30. As explained by the Amici in its legal opinion, an ouster clause is a clause in a statute which seeks to deny or divest the Court of its jurisdiction to hear and determine a matter or its jurisdiction over the exercise of public power. Given the constitutional importance of the

Court's jurisdiction, Court assume that Parliament does not intend to exclude its jurisdiction unless the statutory language introducing an ouster clause is absolutely clear. A citizen's right to seek recourse Courts for the determination of his rights is not to be excluded except by clear words. The Court thus needs to determine whether the said provisions of the NLC Act can oust the jurisdiction of this Court."

38. The absolutist position of the stated section 16 was subject of a constitutional petition which challenged its stature on the premise that it potentially impedes the right to access to justice enshrined under Article 48 of *the Constitution* of Kenya. Before the Supreme Court of Kenya (SCORK), it was urged that that the stated section 16 extinguishes an employee's right to file an action for damages in respect of any occupational accident or disease resulting in the disablement or death of such an employee as against his employer. It was urged that that it impinges on an employee's right to property under Article 40(1) and (2) of *the Constitution* 2010 and restricts the enjoyment of the rights to access to justice and fair hearing under Articles 48 and 50 of the said Constitution.

39. And yet having subjected section 16 to the rigour of the foregoing test for ouster clauses, the absolutist stance of section 16 was vindicated by SCORK in Law Society of Kenya vs. Attorney General & another [2019] eKLR, which affirmed the unwavering stature of the section, reasoning that in no way does it obstruct access to justice since the forum provided of the Director of Occupational Safety and Health Services, is sufficient to serve justice and it does not permanently limit the right to access to Courts since sections 23 and 52 of WIBA, provides for legal redress to the Employment and Labour Relations Court where a party is aggrieved by the decision of the said Director.

40. The forgoing discourse yields only conclusion that the jurisdiction to hear and determine such a claim lies with the Director of Occupational Safety and Health Services.

41. Since this Court lacks jurisdiction, I down my tools.

Part V: Disposition

42. Consequently, this Court strikes this suit out in its entirety.

43. Since the claim cannot be said to be frivolous, this Court directs that each party shall bear his/its own costs.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 12TH DAY OF AUGUST,2024

.....

C.N. ONDIEKI

Principal Magistrate

Advocate for the Plaintiff/Respondent:.....

Advocate for the Defendant/Applicant:.....

Court Assistant:.....